



**HOUSE COMMITTEE ON LAND DEVELOPMENT (LRC)(2013)**  
**February 27, 2014**  
**Room Magnolia Place Subdivision Clubhouse**

The House Committee on Land Development (LRC)(2013) met on Thursday, February 27, 2014 at 1:00 PM. The meeting was held in Room Magnolia Place Subdivision Clubhouse.

Six committee members were present. Members present were: Representative Mark Brody (Co-Chair), Representative John Torbett (Co-Chair), Representative Larry Bell, Representative Frank Iler, Representative Tim Moore, and Representative Andy Wells.

**I. CALL TO ORDER AND INTRODUCTIONS**

Representative Mark Brody presided. Representative Brody called the meeting to order at 1:00pm and began the meeting by introducing himself, the Sergeants of Arms (Doug Harris and Bob Rossi), Research Staff (Bill Patterson and Shelly DeAdder), and all Representatives present. Representative Brody also took a minute for all local elected officials in attendance to introduce themselves.

Representative Brody then gave a brief overview of meeting rules so the offsite meeting would run smooth and orderly. He then asked Representative Torbett to give a short summary of the Magnolia Place Subdivision issue and how it became a catalyst for this Land Development Study Committee. Representative Torbett briefly shared the history of the Magnolia Place issue but stated this issue was not prominent throughout the state. However, he would like to prevent this situation from happening again to North Carolina citizens.

**II. EXAMINATION OF RETAINING FENCE**

Representative Brody called for a ten minute recess for anyone interested to examine the "retaining fence" in question before further discussion.



### III. PRESENTATIONS

#### North Carolina Department of Environment and Natural Resources

##### 1. *Toby Vinson, Acting Section Chief of Land Quality and Chief Engineer, Raleigh*

Representative Brody asked Toby Vinson to present his information to the committee. Mr. Vinson stated he would answer any questions the committee had on the presentation he gave last month at the Land Development Committee meeting. Representative Brody asked Mr. Vinson to summarize what he spoke about at the last meeting for those who were not in attendance and Mr. Vinson did so. The presentation is NC DENR Regulatory Actions Involving Magnolia Place Townhomes (posted on committee website). Representative Brody then asked if the committee had any questions for Mr. Vinson.

Representative Moore asked Mr. Vinson if a new developer came in to finish the Magnolia Place project under compliance, would that developer be hit with having to pay all the penalties from the previous developer to the state. Mr. Vinson stated the lien would be there but he is pretty sure it could be negotiated with the State Attorney General's office. Representative Moore asked how much was the lien at this point and Mr. Vinson responded that it was over \$35,000 by now. Representative Moore then asked what it would take for this project to get into compliance and Mr. Vinson responded that he did not have that information because they don't develop property nor do property estimates.

Mr. Vinson mentioned he did find plans for the approved retaining wall and he will forward them to the committee for review. Representative Brody announced that all the committee handouts will be available on the committee website for the public to view.

Representative Brody asked Mr. Vinson if the original retaining wall plan was a block structure or wood structure. Mr. Vinson replied that the plans showed it being a wood structure but he didn't know if the wood structure was ever approved. Representative Moore then asked if the retaining wall should have gone all the way up to the top of the hill to prevent erosion. Mr. Vinson replied that it depends on the design of the retaining wall that must also be approved by local code enforcement.

Representative Moore then asked Mr. Vinson what the collaboration was between DENR and the NC DOT when state property is involved such as in this case. Magnolia Place Subdivision is adjacent to NC DOT property (on the other side of the hill). Mr. Vinson responded that the DOT would ultimately be responsible.



Representative Brody asked Mr. Vinson if a new developer would need to replace what is falling down and Mr. Vinson replied that the developer would need to stabilize the ground through a new retaining method and it would require an affidavit from homeowners to work partly on their property. Representative Brody then asked if DENR would be favorably cooperative to work to resolve the issue with a new developer and Mr. Vinson responded that they would. Mr. Vinson mentioned that the General Assembly just passed legislation that allows new developers to assume existing permits with proper documentation and without fees from Environmental Departments.

Bill Patterson asked Mr. Vinson to clarify the ownership of the lot with the fence and if homeowners make repairs to it and are under an acre, will DENR require an erosion control plan and Mr. Vinson replied they would not require it. Representative Torbett then added that the retaining wall is located in the common area that perimeters the homes and is owned by the defunct developer. Mr. Vinson replied that in that case, they could not separate the existing structure from the wall.

Representative Wells then questioned Mr. Vinson on the retaining wall because it bears no resemblance to what was put up. Mr. Vinson replied that the plan Representative Wells was reviewing is what was submitted for second approval when they required revised plans. Representative Wells followed up by asking if the plan was approved by Gaston County Code Enforcement on March 2, 2010 and Mr. Vinson replied that he did not inspect the site.

## *2. Ryan Kormanik, Environmental Senior Specialist, Land Quality Section, Mooresville*

Representative Brody asked Ryan Kormanik to present his information to the committee. Mr. Kormanik gave a brief chronology of his involvement with the Magnolia Place project starting in 1999 when the project application was approved. Inspections began in 2000 and over time the developer was in and out of compliance for several inspections. In 2003, Gaston County developed its own Sediment Control Land Quality Division which delegated land quality powers from the state to Gaston County. At that time, Magnolia Place Subdivision was not accepted into this program because the issue originated before the division was created.

Mr. Kormanik stated that in 2008, they requested the retaining wall be installed as specified in the plan, which was 170 linear feet in length. During an inspection, they noticed the developer cut further down the slope than what was planned so they asked for a revised plan to cover the additional feet. In 2009, the developer sent in a revised plan and it was approved but later that year another revised plan was required and approved under the condition that it got approval from local building code enforcement. In 2010 construction on the project stopped and they asked the developer to put up some stabilization material to hold the ground. The developer complied and used a geotextile material to prevent erosion but, as we can see, has degraded over time. Mr. Kormanik stated we are now left with an open enforcement case and a defunct developer. Representative Brody then asked if the committee had any questions for Mr. Kormanik.



Representative Torbett asked if DENR has the authority to stop a project, such as this, before the structures are built if the developer is out of compliance. Mr. Kormanik replied that DENR does not have that authority because they only look at the grading of the site and not vertical structures or code enforcement.

Representative Wells asked if DENR has communication with local building inspectors during the development process. Mr. Kormanik replied that the communication varies from municipality to municipality but, overall, they are more concerned over the ground work and not the vertical work.

Representative Wells then asked when a developer continuously doesn't do as they are instructed, wouldn't local and state divisions work together to put a stop work order on the development to bring the developer back into line. Mr. Kormanik directed the question to Mr. Vinson. Mr. Vinson responded that they do have stop work orders but there are conditions in which they are enforced. Sedimentation and environmental issues is one of those conditions but this case would not call for a stop work order. Representative Wells followed up by asking if the potential collapse of a DOT fence would call for a stop work order and Mr. Vinson replied that it is not one of the conditions.

Representative Brody asked if the wood retaining wall was on the initial plan and Mr. Kormanik replied that the original 170 linear feet of the fence was supposed to be wood. Representative Brody then asked if the original fence required Gaston County Inspections approval and Mr. Kormanik replied he did not have an answer for that.

Representative Brody asked if the original wooden structure had a stamped seal of approval from a licensed engineer and Mr. Kormanik replied that he believed it did. Representative Brody followed up by asking if there is any liability for an engineer who approved/stamped a design if the structure he/she approved fails and Mr. Kormanik stated he did not have an answer for that. Mr. Kormanik did mention that their department does not require an engineer stamped design.

Bill Patterson mentioned that state statute says a developer has 21 days to get erosion under control before going into violation. Mr. Patterson asked when they begin measuring 21 days and Mr. Kormanik responded that 21 days starts with a site visit. However, Mr. Kormanik stated that if any work is completed during those 21 days, even if it does not meet requirements, the inspector will need to reset the clock on the 21 day limit because it is not considered a final inspection. Mr. Patterson then asked if the work is not in compliance after the 21 day period, then would that require DENR to issue some type of stop work order and would it apply to any work done on the development. Mr. Kormanik referred the question to Mr. Vinson and he responded by saying if there was no offsite sediment or eminent danger, then no stop work order would be issued. Mr. Vinson continued by saying they would find out what is going on with the developer and then issue a notice of violation followed by civil penalties and the possibility of a stop work order, depending on the number of conditions involved.



Bill Patterson then stated there is a clear delineation between responsibilities of DENR and Gaston County Code Enforcement. Mr. Patterson asked if there was anything in place that would call for coordination between DENR and the county when there is a problem like we are seeing in Magnolia Place. Mr. Kormanik referred the question to Mr. Vinson and he responded that there is no requirement like that in place.

Representative Torbett asked if the wall collapses, then who is liable in this case. Representative Brody then asked who would insure that. No one responded to either question. Representative Wells followed up by saying whether there is any statutory requirement or not, if there was a written document stating the issues with a developer, it is hard to believe the local officials wouldn't do anything about it. Representative Wells continued by saying even if they wouldn't do anything, written documentation would have helped us so we didn't have to ask all these questions.

3. *James Moore, Assistant Regional Engineer, Land Quality Section, Mooresville*  
*Zahid Khan, Regional Engineer, Land Quality Section, Mooresville*

Representative Brody mentioned that the committee was not going to hear from James Moore and Zahid Khan because they attended the meeting for reference purposes.

### **Gaston County**

4. *Brian Sciba, Director of Building Inspections*

Representative Brody called on Brian Sciba to give his presentation to the committee. Brian started by saying he has been the Director of Building Inspections for Gaston County for about 2 years but is familiar with the Magnolia Place project. Mr. Sciba stated that building inspections doesn't have the authority to tell you what to build, but just how to build it. He then stated zoning tells you where to build something and DENR is the only one that can tell you to build a retaining wall. Mr. Sciba said that if DENR has a problem with erosion control or wants something stopped, all they need to do is call.

In regards to Magnolia Place, Mr. Sciba stated that the only structure they saw was the wooden fence but it was never intended to be a retaining wall. The inspections department asked the developer what he was building and the developer said a retaining wall. At this point, the inspections department decided the retaining fence did not meet what the developer needed to do. Mr. Sciba made clear that the inspections department never approved any drawings for a retaining wall on this site.

Representative Iler asked if there was an ownership document and if that property is affected by that document. If so, has the document been turned over to the HOA by the developer? Bill Patterson responded that the property is still owned by Evergreen Development, the defunct developer. Representative Iler then followed up by asking if the HOA is responsible for the retaining wall and Mr. Patterson responded that that was a legal question.



Representative Wells stated that final inspectors have a lot of power and can hold a Certificate of Occupancy (CO) which can put a lot of pressure on a developer to get things done. He mentioned that if anything doesn't abide by code, the final inspector can hold the CO. Mr. Sciba stated they are only supposed to meet building code and if they don't follow code than it becomes a "because I said so" code. Representative Wells then asked if the code requires a fence to prevent someone from stepping off a vertical wall on the back of a property at any height and Mr. Sciba responded that there is nothing in the building code to require that. Representative Wells asked what are the time limits are on CO's versus retaining walls and Mr. Sciba responded that he would get Bill Patterson that information.

Representative Torbett asked if Gaston County would issue a CO if a structure was built on the vacant lot today. Mr. Sciba responded that if the builder achieved a grade 10 feet away or a 2 percent slope from the structure with a swell to push water away, then it would be within code. Representative Torbett then followed up by asking if retaining walls were mentioned anywhere in code and Mr. Sciba responded by saying that code just mentions a retaining wall must be 5 feet in height or retaining 5 feet of dirt within 50 feet. Representative Torbett asked if an NC Certified Architect makes the determination for a retaining wall. Mr. Sciba responded by saying an engineer makes the decision if a retaining wall is needed and meets requirements. DENR nor code enforcement can imply the retaining wall needs to be in place.

Representative Wells asked Mr. Sciba if he would give a CO looking at the situation we see today and Mr. Sciba responded that he would. Representative Wells stated that at our last Land Development Committee meeting the speaker from the Building Inspector Association said he would not give a CO based on the situation. Representative Wells asked Mr. Sciba why there was a difference in opinion. Mr. Sciba responded that there are different interpretations of the code but his department follows code as written. He also stated that if there are any gray areas in the code, then you can ask the Department of Insurance to clarify. Representative Wells stated that at some point common sense needs to kick in and the Department of Insurance could have held the CO until this issue was looked at. Mr. Sciba responded that in regards to this issue, there was nothing in the code to cause a gray area. Representative Wells followed up by stating there should have been a conversation about this and common sense used.

Representative Brody asked if a wooden fence was on a plan, had a stamped engineer seal, and building had already started, then wouldn't the inspector require it to be inspected? Mr. Sciba responded that the wooden fence plans were sent to DENR erosion control office where the plans were reviewed. The building inspectors did not issue a permit or inspect the fence. Representative Brody then asked if inspectors could do a stop order for what is already complete and Mr. Sciba responded that the inspector did stop construction once questions were asked about the wooden fence. Representative Brody asked if the fence we see now was built according to engineer standards and Mr. Sciba replied that no inspections were done on the fence.



Representative Iler stated that codes are not consistent across the state. Mr. Sciba stated that the code book says nothing about retaining walls. Representative Iler then stated that the state writes codes, not the county. Representative Wells mentioned that the solution to this issue could be handled at the local level and Gaston County could hold a CO until the developer is in compliance with all applicable state and local ordinances before the developer gets the final CO. Mr. Sciba stated that the developer must be in compliance with other state agencies but the problem is that no one checks. Bill Patterson stated that the CO makes sure the structure has met building code. He continued by saying that Gaston County now does erosion control so a CO can be denied if the ordinance is violated. Mr. Sciba agreed that there is now better communication between departments.

*5. Joseph D. Alm, Stormwater Administrator, Natural Resources Department*

Joseph Alm stated that in 2003, Gaston County adopted its own Soil Erosion and Sedimentation Control Division which has been given authority from DENR. At that point, Gaston County Soil Erosion and Sedimentation Control Division took on new issues and wrote in its ordinance if an issue was in violation. If the issue was in violation, then they would inform code enforcement and request the CO be put on hold until the problem is resolved. Representative Torbett asked if the Magnolia Place issue was addressed by DENR after 2003 since the issue was not covered under the new Gaston County authority but was still a land disturbance. Mr. Alm responded that any questions Gaston County received were forwarded directly to DENR who had authority over the issue. However, DENR did not have the authority to stop the CO from being issued.

Representative Brody called for a five minute break.

**City of Lowell**

*6. Al Greene, City Manager*

Representative Brody asked Al Greene, Lowell City Manager, to give his presentation. See Al Greene attachment for presentation outline. Representative Brody then asked Mr. Greene if Gaston County required a zoning permit to get the building permit. Mr. Greene responded that Gaston County does require a zoning permit but there are a few exceptions but those exceptions must go through a process to get approved. Representative Brody then asked is the City of Lowell voided the permit like Gaston County and Mr. Greene responded that he was not sure. Representative Brody asked if Gaston County has the authority to void a permit and Mr. Greene responded that Gaston County can void the building permit for the wall but does not have the authority to void the zoning permit. Representative Brody asked if the wooden fence was on the approved plans and Mr. Greene responded that there are no plans with a zoning permit.

*7. Martine Vaca, Planning Director*

Representative Brody asked Martine Vaca, Lowell Planning Director, if she would like to speak but she stated that she had nothing else to add from Mr. Greene's presentation.



## **Magnolia Place Homeowners Association**

### *8. Betty Bumgardner, President*

Representative Brody asked Betty Bumgardner to speak on behalf of the Magnolia Place Homeowners Association. Ms. Bumgardner thanked the residents who attended the meeting and the residents who brought refreshments to share. She also thanked the Land Development Committee for coming to their community and trying to help them with this issue.

### **Public Comment** (3 minute limit per person)

### *9. Larry Simmonds, Lowell Mayor*

Larry Simmonds gave a brief timeline of events for the Magnolia Place issue. He stated that the state and City of Lowell should work together to fix the problem.

### *10. Robin Culbertson*

Robin Culbertson asked who exactly owns the property and if the HOA has the right to build on it? Bill Patterson responded that the property belongs to Evergreen Development but, from what he can see, has not been paying their taxes. Therefore, the taxing authority might have the ability to put a lien on the property or try to sell it.

### *11. Ruth Chaney*

Ruth Chaney said that Magnolia Place Subdivision could be a real asset to the Town of Lowell if they resolved this issue. Ms. Chaney mentioned that she has a family member that estimated it would cost \$35,000 to fix the "retaining fence" and make it safer for the elderly residents to live.

### *12. Dennis Mercer*

Dennis Mercer asked if the County forecloses on Evergreen Development, then will the next owner become responsible for the erosion issues associated with this property. Toby Vinson responded that the next owner would be responsible and it starts the whole process over again. Mr. Mercer then asked if Interstate 85 was widened, would it affect the property? No one had an answer to that question.

### *13. Ralph Duncan*

Ralph Duncan asked if anything was actually going to be done to help Magnolia Place residents with this issue. Representative Brody stated this committee was created by a bill authored by Representative Torbett in hopes to prevent something like this from happening again. The allocation of state funds to fix the problem is probably not going to happen.

### *14. Mary Reichl*

Mary Reichl questioned the engineer who designed the retaining wall and how such a design could even get approved. She stated she was concerned about a mud slide if the wooden fence





were removed and asked if a situation like that would fall under FEMA. Toby Vinson responded by saying it would probably not fall under FEMA.

*15. Lonnie Wilson*

Lonnie Wilson is the Magnolia Place Representative for this issue who has a background in professional engineering. He stated that a professional engineer should not have approved this plan. Mr. Wilson then asked who is singly responsible for this issue. Representative Torbett responded that the defunct developer is responsible and that the community should contact an attorney to have their grievances addressed. Representative Torbett continued by saying this committee is to make sure this issue doesn't happen again and to close any laps in communication with all involved parties.

**IV. COMMITTEE DISCUSSION**

Representative Brody asked committee members if they had any final comments they would like to share. Committee members expressed that they hope this committee can prevent these issues from happening again. Representative Brody thanked Magnolia Place residents for their hospitality and asked them to continue in their efforts.

**V. ADJOURNMENT**

There being no further business, the meeting adjourned at 4:15pm.

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Representative Mark Brody  
Presiding

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Neva Helms, Committee Clerk



**Al Greene**  
**City Manager \* City of Lowell**

Notes for House Committee on Land Development  
February 27, 2014

Magnolia Place Townhomes Clubhouse, Lowell NC

City Staff: Al Greene, Manager

Martine Vaca, Planner/Code Enforcement Officer

1. The property was rezoned by the City Council to accommodate a Planned Residential Development (PRD) in August 1999.
2. The development of the property was approved in three separate phases by plats approved as follows:

Phase I approved in March 2000

Phase II approved in September 2001

Phase III approved in October 2007

3. Phase III contains the area that includes the existing "retaining" wall.
4. In July of 2010 the Lowell City Council approved a new land development ordinance entitled The City of Lowell Unified Development Ordinance. The UDO replaced the ordinance under which all phases of Magnolia Place were approved.
5. Greene and Vaca were both hired by the City of Lowell in 2012.
6. Greene and Vaca have reviewed all city records regarding the Magnolia Place Development, including land use regulations in effect at the time.
7. Section 9-3-85 of the former Zoning Ordinance of the City allowed walls, including retaining walls, of up to 8 feet in height in rear yards.
8. Section 9-3-87 (11) of the former Zoning Ordinance provides that the preliminary site plan of a planned unit development shall show, "General location, height and material of all fences, walls, screens, planting and landscaping."
9. The City has in its possession and is providing copies of several undated plans noted as being preliminary utility plans. None of these plans depicts a wall in the area in question along the border with I-85 right-of-way. One copy does have a retaining wall drawn in by hand along the frontage of Groves Street.
10. We have one plan sheet titled "site plan" dated October 22, 1995 with no retaining wall shown.
11. The final plat for Phase III, approved in October 2007, does not reference or show a wall.
12. A zoning permit was issued by the City of Lowell on June 19, 2009 for a retaining wall. The City has no plans that correspond to the wall proposed by the applicant, but detailed plans would not have been required by the City in granting a permit for a retaining wall. The zoning permit has the words, "Voided by County" written across the top of the permit. Gaston County has advised that plans for the retaining wall submitted to them by the applicant did not meet code. As a result of communications between the County and City at that time, the City apparently decided to void the zoning permit.